STATE OF MICHIGAN

COURT OF APPEALS

SUZANNE BALLANTYNE, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED March 16, 2006
v	No. 258658 Otsego Circuit Court
DOUG FOPMA and DONNA FOPMA, Defendants/Counter-Plaintiffs-Appellants.	LC No. 04-010569-CZ

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendants appeal by right from the circuit court order granting summary disposition under MCR 2.116(C)(10) to plaintiff on her claim for a prescriptive easement. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This dispute involves the use of a second-floor hallway between the separately owned halves of a two-story building in Gaylord. Plaintiff owns the west half of the building. Defendants own the east half of the building. Access to the second floor is provided by a freight elevator, a rear stairway in plaintiff's half that opens into a back room without access to the rest of the second floor, and a central stairway between the two halves that leads to a second-floor landing and a hallway along the center of the building that is located entirely on defendants' east half of the building.

Plaintiff's half of the building had been used as a family-run business for about 60 years since 1940. The father of the family owned the building for about 55 years, until he transferred ownership to two trusts in 1995. The trusts held the property while a son of the family continued to operate the hardware business. In 2000, ownership of the building was transferred to another trust and then to the son. The son then closed the hardware business and sold the west half of the building to plaintiff. Incident to that sale, the seller's disclosure statement described a "common stairway and hall with neighbor to east." While the family business operated, the second floor was leased for use as professional offices and later was used by the business for storage. Plaintiff also uses the second floor for storage but does not lease it out.

Defendants' half of the building had been used for various stores and offices. However, in 1987, the owners of the building stopped using their half of the second floor and the hallway

for any purpose. In 1997, defendants acquired their half of the building. Defendants did not initially use the second floor or the second-floor hallway.

The record does not show that any of the owners of the east half of the building ever gave permission to any of the owners of the west half of the building to use the second-floor hallway.

In 2003, defendants began a remodeling project, informed plaintiff that she could not use the second-floor hallway, and blocked the door leading from the second-floor landing to the hallway. Plaintiff sued defendants to enjoin them from blocking access to the second-floor hallway and to obtain an easement over the common hallway. After defendants moved for summary disposition, the circuit court granted summary disposition in favor of plaintiff and issued a permanent injunction "prohibiting the Defendant from blocking access to the hallway between the Plaintiff's and the Defendant's property and further orders that each party, their agents and representative may utilize the common hallway to access their respective buildings."

Defendants appealed, claiming that the mutual use of the second-floor hallway by previous owners precluded a prescriptive easement from arising and that plaintiff could not establish the 15-year period of adverse use required for a prescriptive easement. We disagree.

An easement is a right to use the land of another for a specific purpose. The owner of property who has the right to use the easement is the dominant owner. The person who owns the land upon which the easement runs is the servient owner. *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of 15 years. *Killips v Mannisto*, 244 Mich App 256, 258-259; 624 NW2d 224 (2001). The burden of proof of establishing a prescriptive easement is on the party claiming it. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000).

To establish a prescriptive easement, the dominant owner's use of the property must be adverse to the rights of the servient owner. *Killips, supra* at 258. Adverse use is a use of another's property that is inconsistent with the rights of an owner. *Id.* at 259. Michigan law distinguishes between permissive and non-permissive mutual use. The dominant owner's use of the property need not be exclusive of the servient owner's use, but the dominant owner's use may not be permissive use because permissive use is not adverse. *Plymouth, supra* at 679; *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Further, where two buildings have a shared stairway for many years, "there is presumption of adverse use and prescriptive easement." *Sallan Jewelry Co v Bird*, 240 Mich 346, 348; 215 NW 349 (1927).

A party may "tack" on the possessory periods of predecessors in interest to achieve the requisite 15-year period by showing privity of estate. In *Killips, supra* at 259, this Court stated:

> A party may "tack" on the possessory periods of predecessors in interest to achieve this fifteen-year period by showing privity of estate. *Dubois v Karazin*, 315 Mich 598, 605-606; 24 NW2d 414 (1946); *Connelly v Buckingham*, 136 Mich App 462, 474; 357 NW2d 70 (1984). This privity may be shown in one of two ways, by (1) including a description of the disputed acreage in the deed, *Arduino v Detroit*, 249 Mich 382, 384; 228 NW 694 (1930), or (2) an actual transfer or

conveyance of possession of the disputed acreage by parol statements made at the time of conveyance. *Sheldon v Michigan Central R Co*, 161 Mich 503, 509-510; 126 NW 1056 (1910); *Gregory v Thorrez,* 277 Mich 197, 201; 269 NW 142 (1936).

Defendants challenge only two elements: adverse use and the 15-year period of use. Regarding adverse use, there is no dispute that the second-floor hallway lies on the east half of the building and that the hallway had been used *without permission* from at least 1943 until 1987 by plaintiff's predecessors-in-interest as a common hallway for invitees and the owners to access offices, business, and storage on the second floor. In 1987, it appears that defendants' predecessors no longer used the second floor but that plaintiff's predecessors continued to use the second floor, again *without permission,* incident to their operation of the family business. The continued use of the second-floor hallway that lies on defendants' side of the building by plaintiff and plaintiff's predecessors-in-interest is inconsistent with the servient owners' right to exclusive use of their property. Therefore, the use of the hallway by plaintiff and her predecessors was adverse.

Regarding the 15-year period of adverse use, as noted, the record in this case shows that plaintiff's predecessors used the second-floor hallway without permission for about 60 years. Even if years of non-permissive *mutual* use are not be counted toward the 15 years of adverse use, the record shows that, after defendants' predecessors stopped using the second floor and the hallway in 1987, plaintiff and her predecessors continued to use the hallway until the present, which exceeds the 15-year period required for a prescriptive easement.

Defendants finally argue that a prescriptive easement could not have arisen in this case because the previous *owners* of the property did not exercise adverse use of the property for the requisite period. Defendants rely on *St Cecelia Society v Universal Car & Service Co*, 213 Mich 569; 182 NW 161 (1921), *Engleman v Kalamazoo,* 229 Mich 603; 201 NW 880 (1925), and *Devries Development & Nm Land Development Company, LLC v Extra Room Of Kalamazoo,* unpublished opinion per curiam of the Court of Appeals, issued February 2, 1999 (Docket No. 205175) for the legal proposition that a prescriptive easement cannot arise unless the *owner* of the dominant tenement exercises the adverse use over the servient tenement. Defendants argue that the son who ran the family business and used the hallway before he sold it to plaintiff was not the *owner* of the building until 2000 so that period of adverse use from 1987 to 2000 could not be aggregated as part of the required 15-year period.

Defendants are correct that the cases state that the *owner* of the dominant tenement must exercise the adverse use, but it is not clear that the *owner* must personally or individually do so. A more reasonable reading of these cases is that the *owner* of the dominant estate or its agents, employees, or tenants must exercise the adverse use of the servient estate as opposed to a third party, such as a neighbor, an interloper, or other members of the general public who may have used the access. Such a reading is consistent with the law of prescriptive easements, especially where the owner of the dominant estate is a corporation or a trust, as the owner was in this case.

Affirmed.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra